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No. 91-1081

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MARIE E. WIRSING,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, and each of its members, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, AND DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; and E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a University requirement, that all faculty members facilitate the distribution to students of a standardized teaching evaluation form, infringes upon faculty members' academic freedom in violation of their First Amendment rights to freedom of speech and expression.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unpublished. It was issued on October 4, 1991 in case number 90-1215. It is reprinted in the Petition for Writ of Certiorari at appendix A1-A3.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Marie Wirsing is a professor of education at the University of Colorado at Denver. She challenges the requirement that all faculty participate, to a minimal degree, in providing standardized teaching evaluation forms to University students. She claims that the University of Colorado requirement that she participate in this teaching evaluation process violates her First Amendment rights to academic freedom and to free speech.

Dr. Wirsing believes and teaches that teaching cannot be adequately evaluated by use of any standardized evaluation form. This position forms the factual basis for her objection to participating in the University's teaching evaluation process, and for this lawsuit.

The teaching evaluation process at issue neither requires nor allows significant involvement of the faculty. Dr. Wirsing is required only to select a student proctor to provide the evaluation forms to her students, and to

remove the evaluation forms supplied to Dr. Wirsing from her campus mailbox and provide them to the student proctor. The student proctor distributes the evaluation forms to students during the last class session of the semester. The student proctor collects the completed evaluation forms and turns them in directly to the administration for compilation.

Dr. Wirsing is not in any manner prohibited by the University's policy from using her own student evaluation form in addition to the standard form. She is allowed and encouraged to express her own philosophy of teaching evaluation, both in her classroom and in all other forums. The University has not interfered with or discouraged Dr. Wirsing's criticism of the use of standardized evaluation instruments.

The United States District Court for the District of Colorado granted the University's motion for summary judgment, finding that the minimal involvement of Dr. Wirsing in the teaching evaluation process did not rise to the level of a First Amendment violation. The United States Court of Appeals for the Tenth Circuit affirmed.

SUMMARY OF THE ARGUMENT

Dr. Wirsing has failed to establish that protected expressive conduct is affected by the University teaching evaluation process and her limited involvement in this process. The District Court and Court of Appeals properly found that no First Amendment right is implicated by the facts of this case. Dr. Wirsing's ability to teach her

own philosophy and theories regarding teaching evaluation is not in any manner inhibited by the Regent's requirement. The concept of academic freedom does not allow faculty members to disregard any administrative requirement of their employment with which they philosophically disagree.

REASONS FOR DENYING THE PETITION

I. THE UNDISPUTED FACTS OF THIS CASE DO NOT SUPPORT A CLAIM OF VIOLATION OF ACADEMIC FREEDOM

The University of Colorado is a four-campus system of higher education. Its governing body is an elected Board of Directors, the Regents of the University of Colorado. The University of Colorado's Boulder campus first developed a standardized evaluation instrument in 1975 (Doc. 12, Buechner affidavit, at p. 1). It was developed at the request of the Regents by an eleven member committee consisting of six students, three faculty members, one member of the University testing service and one representative from the Office of the Chancellor (Doc. 12, at p. 1). The University faculty council appointed the three faculty members; the University student union appointed the six student members (Doc. 12 at p. 1). Beginning in 1975 and continuing throughout the University's use of this "faculty course questionnaire ("FCQ"), the FCQ's have been administered by a party other than the faculty member who is the subject of evaluation (Doc. 12 at p. 1).

After nine years of experience with a standardized FCQ at the Boulder campus, the Regents enacted a resolution that each of the four University campuses develop and use a standardized evaluation instrument (Doc. 12 at p. 1 and at appendix B). The Regents required campus development of an instrument that "meets that individual campus' specific needs, so long as such forms are uniform for that campus, include an evaluation of individual faculty, and are adaptable to either the individual campus research and testing services or such services as exist on the Boulder campus" (Doc. 12 at p. 1 and appendix B).

A University-wide committee similar in composition to the 1975 Boulder committee was appointed to oversee development and use of FCQ's (Doc. 12 at p. 1 and appendix B). The University of Colorado at Denver campus form was put into use in 1987 with specific policies prohibiting faculty involvement in the evaluation process (Doc. 11, Grady affidavit, pp. 1-3). These policies were provided to Dr. Wirsing (Doc. 11 at p. 3). Faculty members are allowed only to remove the FCQ's from their campus mailboxes, check to be certain they have the proper course numbers on them, and provide them to a student-proctor with pencils for student use in completing the forms (Doc. 11, at pp. 1-3). These instructions are written and clear. They are provided in writing to the faculty with each group of FCQ's (Doc. 11 at appendix A and appendix B. pp. 3 and 4). Faculty members may not be present while students complete the forms, nor are the faculty allowed to see the completed forms until after the FCQ results are tabulated and after all final course grades have been published (Doc. 11). This policy assures

students that their comments on the FCQ's will not affect their course grades.

Dr. Wirsing provides an evaluation form of her own design to her classes (Doc. 6, Wirsing affidavit). Most if not all of the information sought by the Wirsing form can be obtained by the Regent-approved FCQ (Doc. 6, appendices G & H to Wirsing affidavit). The FCQ asks students to rate their instructors over a five point spectrum from "very poor" to "very good" on twelve questions concerning such items as course material, exam content, workload, and accessibility of the instructor. Importantly, there is an additional choice for students answering these twelve questions. They may mark each or any question "not applicable" (Appendix G to Wirsing affidavit). If, as Dr. Wirsing contends, the twelve questions presented to the students are wholly irrelevant to her course due to her unique teaching methods, the appropriate response for students in this course is "not applicable". Two of these twelve questions (numbers eleven and twelve) ask the student to rate this course and the instructor comparatively, considering all other courses the student has taken at the University. Again, a "not applicable" option is presented to the students for these two questions (Appendix G to Wirsing affidavit).

The student evaluation form contains three additional questions which require written comments by the students rather than simple rating. These questions ask students to describe the most and least effective aspects of the course, and the best ways to improve the course. These three questions are similar to the course evaluation which Dr. Wirsing prefers and which she uses in her courses. (Appendices G & H, Wirsing affidavit). In Dr.

Wirsing's form, she asks students to write comments on "your opinions of the course itself", "your opinions about the instructor", and "specific suggestions for improving the course". The most significant difference between Dr. Wirsing's course evaluation sheet and that mandated by the Regents is that Dr. Wirsing asks that students evaluate their own participation and involvement in the work of the course. However, the Regent-mandated form provides an opportunity for such response by the students: the last item on the Regent-mandated form is allocated for "additional questions provided by your instructor or for further comments" (Appendix G, Wirsing affidavit). Dr. Wirsing is allowed and encouraged to use her own evaluation instrument in addition to that approved by the Regents (Doc. 4, Grady affidavit).

Dr. Wirsing misunderstands the role of the courts in disagreements of the nature of her dispute over teaching evaluations. Dr. Wirsing seeks to persuade the court that her view is the better one. She seeks to do so here by inappropriately including her petition for writ of certiorari references to, and excerpts from, books and articles on educational theory which are outside of the record in this case. These improper references include those listed on pages vi through viii of the petition and the discussion of these references, particularly that found in footnotes 1, 2, 3, 4, 6 and 10 and in the text on pages 23-25.

The question of the best method for teaching evaluation is not one for the courts, but is for each educational institution to determine for itself. *See Epperson v. Arkansas*, 393 U.S. 97 (1968). The lower courts' holdings that the University's teaching evaluation policy is not violative of faculty academic freedom are well-founded in fact and law.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE CONCEPT OF ACADEMIC FREEDOM DOES NOT PROHIBIT REASONABLE ADMINISTRATIVE GOVERNANCE OF THE UNIVERSITY

Dr. Wirsing's complaint is brought under the First Amendment concept of academic freedom. Her reliance on this concept is misplaced. Academic freedom has never been interpreted to mean the freedom to disregard reasonable University-mandated policies or regulations.

Academic freedom is a protection provided to both teaching institutions and teaching faculty. The "four essential freedoms" of a University are to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Academic freedom for faculty guarantees that teachers will not be asked to give up their First Amendment rights at the schoolhouse door. They retain the same First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563 (1968). This includes the right to publicly criticize school policies and procedures without fear of retaliatory dismissal. *Id.*

The courts have historically been most reticent to become involved in academic freedom disputes between institutions and faculty concerning course content, teaching methods, or classroom behavior. Courts have viewed

these matters as best left to the administrators and educators who have primary responsibility over academic affairs. Kaplan, *Law of Higher Education*, (1978), at 148.

The distinction between content-neutral and content-based regulation appears throughout case law deciding academic freedom issues. In general, the courts have upheld the academic freedom of the faculty member when subject to content-based regulation and have tended to hold the academic freedom rights of the University or school paramount when faculty members are governed by content-neutral regulation.

The concept of academic freedom has been addressed by the United States Supreme Court on several occasions. The Court's early academic freedom cases concern the right of faculty members to freely associate in their private lives without threatening their employment. See, for example, *Shelton v. Tucker*, 364 U.S. 479 (1960), invalidating a state statute which compelled public school and college teachers to reveal all organizational affiliations or contributions, and *Keyishian v. Board of Regents, supra*, invalidating laws requiring faculty at the State University of New York to sign a certificate stating they were not and had never been communists. In *Pickering v. Board of Education, supra*, the Court reaffirmed the right of a high school teacher to publicly criticize the spending decisions of the school board. The Court addressed the content of teaching in the classroom in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), where the Court disapproved "content-based" regulation of a lecture delivered at a state university.

This Court's most recent discussion of academic freedom is found in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). The Court reviews the history of the academic freedom cases decided in favor of faculty members and distinguishes those cases, such as *Sweezy* and *Keyishian*, by reference to their content-based regulations as opposed to the content-neutral regulation in *University of Pennsylvania*. The Court states at 493 U.S. at 197:

> In our view, petitioner's reliance on the so-called academic freedom cases is somewhat misplaced. In those cases government was attempting to control or direct the content of the speech engaged in by the University or those affiliated with it. In *Sweezy*, for example, the court invalidated the conviction of a person found in contempt for refusing to answer questions about the content of a lecture he had delivered at a state university. Similarly, in *Keyishian*, the court invalidated a network of state laws that required public employees, including teachers at state universities, to make certifications with respect to their membership in the Communist Party. When, in those cases, the court spoke of 'academic freedom' and the right to determine on 'academic grounds' who may teach, the court was speaking in reaction to content-based regulation. See *Sweezy v. New Hampshire* . . . (citations omitted).

No United States Supreme Court case known to counsel addresses the issues of faculty refusal to comply with a reasonable regulation of the University governing teaching evaluation methods. The United States Courts of Appeals have, however, specifically addressed this issue, and have consistently held that academic freedom does

not allow the unfettered discretion of faculty to ignore or defy the reasonable regulations of the University.

In *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419 (1st Cir. 1986), a faculty member contended that his right to academic freedom was violated when he was denied tenure because he refused to change his grading policies. The court held that even if he were fired for refusing to lower his standards, he failed to state a constitutional claim. *Id.* at 425. Finding that the First Amendment does not require that a teacher be made a sovereign to himself, the court held that the University, not the individual faculty member, had the right to set policy on course content, homework load and grading policy. *Id.* at 426. The court particularly noted that the teacher was not denied employment for voicing an opinion regarding these policies, but for refusing to comply with the policies.

In *Hetrick v. Martin*, 480 F.2d 705 (6th Cir.), *cert. denied*, 414 U.S. 1075 (1973), a nontenured professor brought a civil rights action against the University for failing to renew her contract. The grounds for nonrenewal were Dr. Hetrick's impermissible deviation from the teaching standards thought appropriate by her supervisors. The Court of Appeals holds at 707-708:

> The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A University has

> a right to require some conformity with whatever teaching methods are acceptable to it. In this case, it simply appears that Dr. Hetrick's teaching techniques were not acceptable to the University. The court is not in a position to weigh the merits of Dr. Hetrick's educational philosophy – it may be that her methods of teaching were and are more desirable than those embraced by the other members of the English Department – but the fact that the University decided that they were not and chose not to renew her contract does not mean that her constitutional rights to academic freedom and freedom of speech were impinged.

It is a basic premise of academic life that a professor's performance will be regularly reviewed for contract renewal until tenure is granted, for tenure, for periodic post-tenure review, and for salary adjustments. The courts have upheld a University's right to conduct such review, finding no infringement on academic freedom. In *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989), the Sixth Circuit Court of Appeals distinguishes First Amendment freedoms from proper administrative review. The court states at 830:

> It has long been recognized that the purpose of academic freedom is to preserve the "free marketplace of ideas" and protect the individual professor's classroom method from the arbitrary interference of University officials. University administrators, however, are free to observe, review or evaluate a nontenured professor's competence. See, e.g., *Hetrick*, 480 F.2d at 709. Moreover, because public education in America is committed to the control of local and state authorities, courts cannot intervene to resolve

> educational conflicts that do not "sharply implicate basic constitutional values." *Epperson*, 393 U.S. at 104, 89 S. Ct. at 270.

Most recently, in *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2620 (1990), the court refused to intervene in the non-renewal of an employment contract of a public high school teacher when the teacher claimed that the non-renewal was an attempt to censor the contents of a supplemental reading list which he used in a world history course. The court held that the teacher's conduct in disregarding the school district's administrative process for approval of reading lists was not protected speech. In holding that the district court had erred in failing to hold as a matter of law that First Amendment rights were not involved in this dispute, the court states at 800:

> Contrary to Kirkland's suggestion, this case fails to present a matter of public concern with respect to censorship of reading material or a teacher's "academic freedom". Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.

The case now before the Court is in accord with these decisions of the Courts of Appeals regarding the limits of academic freedom. In *Wirsing v. University of Colorado*, 793 F. Supp. 551 (D. Colo. 1990), the district court finds that Dr. Wirsing's First Amendment rights are not violated by the University's policy. The court holds at 793 F. Supp. 551, 553-54:

Here, the record is clear that Dr. Wirsing was not denied her merit salary increase because of her teaching methods, presentation of opinions contrary to those of the university, or otherwise presenting controversial ideas to her students. Rather, she was denied her merit increase for her refusal to comply with the University's teacher evaluation requirements. As one court has stated:

> Academic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive of the proper function of the University or disruptive of the education process.

Stastny v. Bd. of Trustees, 647 P.2d 496, 504 (Wash. App. 1982), *cert. denied*, 460 U.S. 1071 (1983). Further, although Dr. Wirsing may have a constitutionally protected right under the First Amendment to disagree with the University's policies, she has no right to evidence her disagreement by failing to perform the duty imposed upon her as a condition of employment. *Shaw v. Bd. of Trustees*, 396 F. Supp. 872, 886 (D.C. Md. 1975), aff'd, 549 F.2d 929 (4th Cir. 1976).

. . .

Moreover, the evaluation forms are not expressive of a content-based regulation. See *Sweezy v. New Hampshire*, 345 U.S. 234 (1957). Each form invites written comments and has a choice selection "not applicable" that Dr. Wirsing's students may select if the form, as Dr. Wirsing contends, is irrelevant to her course. Significantly, as the University concedes, Dr. Wirsing may use the form as an example of what not to do; she may

> criticize openly both the form and the University's evaluation form policy. Further, the evaluation forms are not distributed until the course has been completed substantially. Although the form is contrary to what Dr. Wirsing teaches, her free speech is not implicated by using the form. Accordingly, I conclude that the evaluation forms represent a University policy and procedure unrelated to course content that in no way interferes with Dr. Wirsing's academic freedom.

This case does not present a question of substance not previously addressed by this Court or a factual situation to which conflicting federal decisions would apply, and does not fall within the special circumstances required for review on writ of certiorari by Rule 10, Rules of the Supreme Court.

Dr. Wirsing assumes a broader protection for her refusal to comply with the evaluation procedure than is provided her by the concept of academic freedom. The decision of the Court of Appeals is in accord with well-established law and should not be reviewed by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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